

United States  
Circuit Court of Appeals

For the Ninth Circuit

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W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a Cor-  
poration, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

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In the Matter of WISHKAH LOGGING COMPANY,  
a Corporation, Bankrupt.

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Motion to Dismiss Petition for Revision

Filed

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Clerk.

AUSTIN M. WADE,  
Attorney for Respondent.  
Aberdeen, Washington

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**MOTION TO DISMISS.**

F. R. Archer, receiver, respondent, moves the  
dismissal of the petition for revision:

*First:* The record is totally incomplete. It  
lacks the decision of Judge Cushman deciding that  
the receiver's claim should be paid because of serv-  
ices in preserving the estate. There is no statement  
of the taxes claimed to be prior; no showing that

any claim for taxes was ever filed; the evidence on which the trial court acted has not been sent up.

*Second:* No assignment of errors was filed in the court below as required by rule eleven of this court; the transcript of the record, as printed, contains no assignment of errors.

*Third:* The trustee, petitioner, has no interest in whether the taxes are paid or not; Chehalis County does not complain.

*Fourth:* The petition for review was filed too late. The trial court on June 30, 1915, ordered the receiver's claim to be paid; the petition for review was not sued out until November 3, 1915. Trans. 4.

*Fifth:* The order to pay the receiver is based on findings of fact that the receiver preserved the estate; and no showing that the taxes were a charge, or a lien upon the estate.

## ARGUMENT.

The incomplete state of the record requires a dismissal of the petition to revise. The record does not show that the alleged tax claim was ever presented to the trial court. The decision ordering payment of the receiver's bill was rendered on June 30th, 1915, Trans. 16. The tax claim was sworn to on July 16, 1915, 16 days later. Trans. 12-13. There is nothing in the record to show this tax claim was presented, or acted on, either allowed or disallowed.



The claim for taxes, as printed, Trans. 13, is incomplete. The "bills and statements" are not attached.

No exceptions were taken to Judge Cushman's decision of June 30, 1915, Trans. 16, nor to the order of the referee based thereon on July 31st, 1915, nor the court's approval thereof on October 25th, 1915. Trans. 16-17.

The issue tried out below was whether the receiver preserved the property. The court decided this by a memorandum decision, which probably is printed in the Federal Reporter, although we have been unable to find it. This decision bears date June 30th, 1915. (See petition for revision, Trans. 2).

The record is intentionally incomplete. The precipe for transcript shows petitioner did not desire a complete record. It asks for:

*"Two, claim of Chehalis County for taxes, without bills and statements."*

Why without "bills and statements?" The obvious answer is that the tax claim is for taxes on *other property*. It is clear that there would not be a claim for taxes in the sum of \$499 assessed against a fund of \$300. The other property was mortgaged property to which the trustee disclaimed any interest.

*In re O'Connell*, 137, Fed. 838.

*Landry vs. San Antonio Brewing Ass'n.* 159 Fed. 700.

*Gaudette vs. Graham*, 164 Fed. 311.

## UPON THE MERITS.

The case cited by petitioner that a claim for taxes is prior to receiver's fees lacks application. The taxes claimed were assessed against other property, not involved in this case—property which passed to the mortgagee, Hayes & Hayes, long prior to bankruptcy. Doubtless it was for this reason that petitioner did not desire a statement of the taxes in the record. The trial court allowed the receiver's bill as a prior claim on June 30, 1915; the claim for taxes was sworn to 16 days later. The record does not show any action thereon whatever.

The petition which is assumed to be the basis for the hearing in the trial court, was that the fund in question be paid to the trustee's attorney for services. Trans. 13. Said petition is supported by the affidavit of G. R. Snider, which discloses no taxes due on the fund in question, but it does show that three mortgages had been foreclosed against other property. This petition is the only one in the record, on the subject of receiver's charges.

The taxes upon the disclaimed property follows the property and should not be paid by the trustee.

In re *Hollenfeltz*, 94 Fed. 629.

In re *Stalker*, 123 Fed. 961.

In re *Garry*, 112 Fed. 958.

2 Remington, *Bankruptcy*, Sec. 2148.

Since the claim for taxes was filed after the decision of Judge Cushman complained of, and such claim was never allowed by the trustee, or the court, and Chehalis County never took an order upon its claim, and has prosecuted no appeal, this court should not, at the instance of the trustee, reverse the order allowing F. R. Archer his receiver's costs and expenses.

Chehalis County never urged its claim in the trial court, and is not appealing, hence court should deny the petition. The true reason the county is not complaining, is that in the trial court, a certificate of the county treasurer was filed, showing that all the taxes upon the property which came into the hands of the trustee, and which he held, had been paid. This is part of the record which the petitioner has doubtless intentionally omitted.

“If beneficial services are allowed, for, they are to be regarded as deductions from the property which the assignee is required to surrender and in that way the gain a preference, *Platt v. Archer*, 13 Blatchf., 351; *In re Scholtz*, 106 Fed. 834; *White v. Hill*, 148 Mass., 396; *Clark v. Sawyer*, 151 Mass., 64.” (*Randolph vs. Schruggs*, 190 U. S. 533 at 539) *In re Chase*, 124 Fed., 753.

Absolutely all that there is to predicate error upon in the record as presented by petitioner, is the bare fact that after a decision by the trial court,



allowing Archer \$256.20 as receiver's fees and costs, a claim was sworn to 16 days later for general taxes. This claim for taxes, incomplete in form, omitted a statement of the taxes, or of the property upon which same is assessed, is found upon page 12 of the transcript. Whether this claim was ever filed or ever allowed, the record is silent. The only question which the petitioner can assert on this appeal is this: Does the mere fact that a claim was filed, after a decision is rendered, show that such decision is erroneous. It is respectfully urged that the motion to dismiss should be granted; in any event, the matters complained of should be affirmed.

Respectfully submitted,

AUSTIN M. WADE,

Attorney for Respondent.

Aberdeen, Wash.